

Attorney Docket No.: J2072(V)  
Serial No.: 10/559,588  
Filed: December 2, 2005  
Confirmation No.: 2719

**BRIEF FOR APPELLANT**

Sir:

This is a Brief for appellant's Appeal in response to the Notice of Panel Decision from Pre-Appeal Brief Review mailed on February 18, 2010, concerning the above-identified application.

A request for an extension of time for one month to April 18, 2010, to submit the Brief is submitted herewith.

The Commissioner is hereby authorized to charge any additional fees, which may be required to our deposit account No. 12-1155, including all required fees under: 37 C.F.R. §1.16; 37 C.F.R. §1.17; 37 C.F.R. §1.18; C.F.R. §1.136.

**BRIEF FOR APPELLANT**

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### **I. REAL PARTY IN INTEREST**

The Real Party in Interest in this Appeal is Conopco, Inc., a corporation of the State of New York, d/b/a Unilever.

### **II. RELATED APPEALS AND INTERFERENCES**

Neither the Appellants, their legal representatives nor the Assignee are aware of any other Appeals or Interferences relating to the present Appeal.

### **III. STATUS OF CLAIMS**

This Appeal is taken from the Final Rejection of claims 1, 3, 4 and 6-10, the pending claims in the application. A copy of the appealed claims is listed in this Brief as VIII. Claims Appendix.

### **IV. STATUS OF AMENDMENTS**

No Amendments after the Final Rejection have been filed.

## **V. SUMMARY OF CLAIMED SUBJECT MATTER**

The following is a summary of the claimed subject matter as recited in the single independent claim 1 involved in the appeal; referring to the specification by page and line number and to the drawing (if any) by reference number as applicable.

Claimed is a transparent liquid or gel soap composition (page 4, lines 21-22) comprising:

5 to 25% by weight of C<sub>12</sub> to C<sub>18</sub> soap (page 4, line 24),

2 to 20% by weight humectants (page 4, line 25), wherein the humectant is selected from polyhydric alcohols including glycerol, sorbitol, polyethylene glycols, propylene glycols and mixtures thereof (page 5, lines 6-8; page 7, lines 23-31);

balance water (page 5, line 11);

wherein the soap comprises unsaturated fatty acid soap which consists essentially of 0.05 to 4 % by weight of the composition castor oil soap or salt of ricinoleic acid, or the derivatives thereof (page 4, lines 29-31; page 7, lines 17-21); and,

wherein the composition is transparent in the temperature range of 4 to 25° C (page 13, line 5 to page 14, line 18).

## **VI. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL**

### **35 U.S.C. § 102(b) or § 103(a)**

Claims 1, 3-4 and 6-10 were rejected under 35 U.S.C. § 102(b) as anticipated by or in the alternative § 103(a) as being obvious over GB 1190023.

Claims 1, 3-4 and 6-10 were rejected under 35 U.S.C. § 102(b) as anticipated by or in the alternative § 103(a) as being obvious over GB 2005297.

## **VII. ARGUMENT**

### **35 USC § 102(b) or §103 (a)**

(a) The examiner's rejection of claims 1, 3-4 and 6-10 under 35 U.S.C. § 102(b) as anticipated by or in the alternative § 103(a) as being obvious over GB 1190023 should be reversed.

GB '023 relates to a liquid biodegradable detergent composition based on alkali metal fatty soap and generically discloses the fact that the composition may contain at least one C<sub>8</sub> to C<sub>22</sub> unsaturated fatty acid (see page 1, line 19).

Applicants respectfully submit that the examiner errs because a proper prima facie case under §§ 102 or 103 has not been made out with respect to the claims at least because GB '023 does not teach or suggest castor oil or ricinoleic acid unsaturated soaps nor the specific concentration range claimed of 0.05 to 4% by wt. for these specific unsaturated soaps.

Assuming arguendo, a proper prima face case was made out, applicant's have unexpectedly found by way of the present invention (see examples) that a small amount of soap made from castor oil based unsaturated fatty acids, their precursors or derivatives, in a C<sub>12</sub>-C<sub>18</sub> soap matrix ensures high transparency in the composition, and allows for a wider formulation

window such as the higher use of sodium soaps, lower use of non-soap detergents and humectants, and use of higher molecular weight fatty acid soaps. It is clear from the present specification (see for example page 12, lines 11 to 17 and also from tables 2 and 3) that the addition of castor oil increases the transparency of the soap composition dramatically and unexpectedly which property is required by the claims. The results from the referenced tables indicate that such behaviour is not seen when a different unsaturated oleate soap is added to the compositions. Therefore it is specifically the castor oil which was discovered to improve the transparency of the present liquid/gel cleansing composition in a specified temperature range thus establishing the criticality for the selection of castor oil/ricinoleic acid soap. Therefore, the claims of the present invention are not anticipated by nor rendered obvious in view of the art of record.

Applicant's respectfully submit that assuming arguendo a proper prima facie case had been set out the unexpected results disclosed in the examples is sufficient to rebut the examiner's rejection under § 103. KSR v. Teleflex, 127 S.Ct. 1727 (2007). MPEP 716.02(a). When a person of ordinary skill is faced with "a finite number of identified, predictable solutions" to a problem and pursues "the known options within his or her technical grasp," the resulting discovery "is likely the product not of innovation but of ordinary skill and common sense." KSR, 127 S. Ct. at 1742. In other cases, though, researchers can only "vary all parameters or try each of numerous possible choices until one possibly arrive[s] at a successful result, when the prior art [gives] either no indication of which parameters [are] critical or no direction as to which of many possible choices is likely to be successful." In re O'Farrell, 853 F.2d 894, 903 (Fed. Cir. 1988). In such cases, "courts should not succumb to hindsight claims of obviousness." In re Kubin, \_\_\_ F.3d \_\_\_, No. 2008-1184, slip op. at 14 (Fed. Cir. Apr. 3, 2009). Similarly, patents are not barred just because it was obvious "to explore a new technology or general approach that seemed to be a promising field of experimentation, where the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it." In re O'Farrell, 853 F.2d at 903. Quoted in Procter and Gamble v. Teva Pharmaceutical, \_\_\_ F.3d \_\_\_, No. 2008-1404, slip op. at 10 (Fed. Cir. May 13, 2009).

The examiner contends that the Tables in applicant's specification are not commensurate in scope with the claimed invention since the examples are drawn to narrower compositions outside the scope of the broader claims, and that criticality cannot be established. In response, applicants respectfully submit that the pending claim limitations that the unsaturated fatty acid containing soap is transparent in a defined temperature range and consists essentially of castor

oil and ricinoleic soaps in a specific narrow concentration range and further contains a specific subset of humectants is commensurate with the experimental showing notwithstanding the examiner's contention to the contrary.

"We feel that the unobviousness of a broader claimed range can, in certain instances, be proven by a narrower range of data. Often, one having ordinary skill in the art may be able to ascertain a trend in the exemplified data which would allow him to reasonably extend the probative value thereof. The proof, thus considered, might then be sufficient to rebut a PTO holding of prima facie obviousness." In re Kollman, 595 F.2d48, [<sup>\*\*20</sup>] 56, 201 USPQ 193, 199 (CCPA 1979).

Applicants respectfully submit that the instant specification contains several soap bar examples which compare several different polyhydric alcohol humectants and two different unsaturated fatty acid soaps which themselves each contain a different distribution of alkyl chain lengths.

Moreover, the examiner has offered no facts whatsoever to show other unsaturated fatty acid soaps and polyhydric alcohol humectants disclosed in the art of record would behave differently in the claimed soap bar (In re Cescon, 474 F.2d 1331, 1334; 177 USPQ 264, 267 (CCPA 1973)). Applicants respectfully submit that the examiner has not carried his burden to provide a rational basis for the skilled person to expect other prior art disclosed humectants and unsaturated soaps would behave differently than those exemplified in the instant case according to the analogous situation in In re Cescon.

Furthermore, applicants respectfully submit the examiner's assertion that the claim must be limited to specific compounds disclosed in the specification is in error.

"Certainly, objective evidence of nonobviousness must be commensurate in scope with the claims which the evidence is offered to support (citations omitted). By the same token, appellant is not required to test each and every species. Rather patentability is established by a showing of unexpected superiority for representative (emph.) compounds within the scope of the appealed claims. What is representative is a factual question which is decided on a case-by-case basis." In re Winters, 11 USPQ 2d 1387 (Bd. Pat. App. & Interf., 1989).

Applicants respectfully reiterate, assuming arguendo that a proper prima facie case had been set out, that the testing of propylene glycol, glycerine, Peg-1500, castor soap and oleate soap satisfies the standard articulated in the cases discussed above whereby the proffered evidence of unexpected results is commensurate in scope with the claims.

(b) The examiner's rejection of claims 1, 3-4 and 6-10 under 35 U.S.C. § 102(b) as anticipated by or in the alternative § 103(a) as being obvious over GB 2005297 should be reversed.

Applicants respectfully submit that GB2005297 does not disclose or suggest that very low amounts of castor oil soap or salt of ricinoleic acid improve the transparency of a liquid cleansing composition because the cleansing composition of GB2005297 is specifically creamy white and not transparent. Therefore, GB 2005297 teaches away from transparent soap and is directed toward formulating a creamy white liquid soap (see page 2, line 20). Furthermore, GB2005297 does not disclose the amount or kind of unsaturated fatty acid present in the claims and it would not be obvious to the skilled person what and how much unsaturated fatty acids is required because the requirement of GB '297 is to produce a creamy white soap and not a transparent soap as claimed. Consequently, GB '297 fails to remedy the deficiencies of GB '023.

Improper citation to WO 2006/045390 (WO '390) by the Examiner

Referring to paragraph 11 of the final rejection with a notification date of October 26, 2009, the examiner contends that GB '023 or GB '297 teaches coconut acids and palmitic acids used in forming soaps (examples 1-6). However, there is no specific disclosure of castor oil soap or salt of ricinoleic acid or derivative thereof in either GB'023 or GB'297. The examiner has sought to remedy this deficiency by referring to WO '390. Applicant respectfully submits that the examiner has previously withdrawn the rejection of obviousness over WO '390 under 35 U.S.C. 103(a) in the office communication dated 11/03/2008 page 3, paragraph 9 and the anticipation rejection under 35 USC § 102(e) in the office communication dated April 28, 2009, paragraph 10. In view of this, the deficiencies of GB '023 or GB '297 can not be remedied in the way the examiner attempts to do so.

In conclusion, applications have discovered a toilet bar composition with specific characteristics as presently claimed that unexpectedly gave superior transparency compared to comparative cases as discussed above.

## VIII. CLAIMS APPENDIX

Claim 1 A transparent liquid or gel soap composition comprising:

5 to 25% by weight of C<sub>12</sub> to C<sub>18</sub> soap,

2 to 20% by weight humectants, wherein the humectant is selected from polyhydric alcohols including glycerol, sorbitol, polyethylene glycols, propylene glycols and mixtures thereof;  
balance water;

wherein the soap comprises unsaturated fatty acid soap which consists essentially of 0.05 to 4 % by weight of the composition castor oil soap or salt of ricinoleic acid, or the derivatives thereof;  
and,

wherein the composition is transparent in the temperature range of 4 to 25° C.

Claim 2 (cancelled)

Claim 3 The transparent liquid or gel soap of claim 1 wherein the soap is present in 14 to 22% by weight of the composition.

Claim 4 The transparent liquid or gel soap of claim 1 wherein the soap comprises unsaturated fatty acid soap which consists essentially of 0.1 to 3% by weight of the composition castor oil soap or salt of ricinoleic acid or the derivatives thereof.

Claim 5 (cancelled)

Claim 6 The transparent liquid or gel soap of claim 5 wherein the polyhydric alcohol is glycerol.

Claim 7 The transparent liquid or gel soap of claim 1 wherein the humectant is present in 5 to 15% by weight of the composition.

Claim 8 The transparent liquid or gel soap of claim 1 further comprising not more than 20 % by weight of a non-soap detergent active.

Claim 9 A process for preparing the transparent soap composition of claim 1 comprising the step of mixing

- (i) the total amount of salts of fatty acids including those prepared from castor oil or ricinoleic acid or their derivatives;
- (ii) water; and
- (iii) the humectants.

Claim 10 The process of claim 9 further comprising the step of adding suitable non-soap detergent actives.

## **IX. EVIDENCE APPENDIX**

The 37 C.F.R. § 1.132 declaration of Niraj Dhansukhlal Mistry and definitions of castor oil and ricinoleic acid from the Merck Index 13th edition, 2001, have been entered in the case and are relied on by appellant (attached hereto).

No other evidence pursuant to 37 C.F.R. §§ 1.130, 1.131 or 1.132 or any other evidence has been entered by the examiner and relied upon by the appellant in this appeal.

Attorney Docket No.: J2072 (C)  
Serial No.: 10/559,588  
Filed: 12/02/2005  
Confirmation No.: 2719

**DECLARATION**  
**Under 37 CFR § 1.132**

**DECLARATION UNDER 37 CFR § 1.132 THAT INVENTOR(S) NAMED IN THIS APPLICATION CONCEIVED OR INVENTED THE SUBJECT MATTER OF THIS APPLICATION WHICH IS DISCLOSED IN THE CITED PATENT OR PUBLISHED APPLICATION**

Sir:

I, NIRAJ DHANSUKHLAL MISTRY, hereby declare that:

1. Cited against this application are unclaimed disclosures of PCT publication WO2006/045390 of which I am a named inventor.

2. I, an inventor of this application and signing below, hereby declare that the cited disclosures in the above identified publication were conceived or invented by me. The cited disclosure refers to a cleansing composition, including but not limited to the following: (a) 5 % to 25 % by weight of soap (b) 5 % to 20 % by weight humectants, (c) water; wherein the soap comprises 0.05 % to 3 % by weight of the composition salt of unsaturated fatty acid, etc, as described in page 4 etc. of PCT publication WO2006/045390.

3. I declare that all statements made herein of my own knowledge are true and all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that wilful false statements and the like so made are punishable by fine or imprisonment, or both, under 18 U.S.C. § 1001 and that such wilful and false statements may jeopardize the validity of the application or any patent issuing thereon.

Dated: 3<sup>rd</sup> December 2008

By: 

Name: NIRAJ DHANSUKHLAL MISTRY



caution: Ingestion may cause nausea, vomiting, hemolytic gastroenteritis, hepatic and renal damage, convulsions, hypotension, respiratory depression, death.

**206. Ricinoleic Acid.** [141-22-0] (9Z,12Z)-12-Hydroxy-9-octadecenoic acid; 12-12-hydroxyoleic acid.  $C_{18}H_{34}O_3$ ; mol wt 298.46. C 72.44%, H 11.48%, O 16.08%.  $CH_3(CH_2)_7CH=CH(CH_2)_7COOH$ . Found primarily in oils from the seeds of *Ricinus* spp. *Euphorbiaceae*. Accounts for 100% of the triglyceride fatty acids of castor oil, and up to 80% of the glyceride fatty acids of ergot oil. Bibliography: Ralston, *Fatty Acids* (New York, 1948) p 189. Also found from *Linum mucronatum* (flex). *Linaceae*: Kleiman, *Ann. Lipids* 6, 962 (1971). Structure: Goldsobel, *Ber. 27*, 189 (1894). Mechanism of biosynthesis: Morris, *Biochem. Soc. Res. Commun.* 29, 311 (1967).

Phys.  $d_4^{25}$  0.940; mp +5.5°; bp<sub>10</sub> 245°.  $[n_D^{25}] +6.67$ ;  $n_D^{20} +7.15$  ( $c = 5$  in acetone);  $n_D^{14716}$  1.4716. Neutralization eq 87.98; iodine value 85.05. Sol in alcohol, acetone, ether, benzene (cf. the solubilities of castor oil).

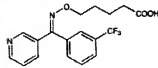
**Uses.** Ricinoleosulfuric acid.  $C_{18}H_{34}O_4S$ . Obtained by reaction of chlorosulfonic acid. Viscous brown liquid with blue fluorescence. Sol in water (about 10%), alcohol, chloroform.

**Form salt.** [5323-95-5] Sorcin; Colidosan. Sodium salts of fatty acids from castor oil. White or slightly yellow, odorless, almost odorless powder. Sol in water or alcohol. The alkali.

**Uses in textile finishing:** sometimes added to Turkey red oil, washing soaps.

**AP CAT:** Has been used in contraceptive jellies. The sodium salt has been used as sclerifying agent.

**8. Ridogrel.** [110140-89-1] 5-[[[E]-3-Pyridinyl[3-methoxy]phenyl]methyl]amino]oxy]pentanoic acid;  $C_{20}H_{21}N_2O_5$ ; mol wt 366.33. C 59.02%, H 4.68%, N 7.65%, O 13.10%. Combined thromboxane  $A_2$  inhibitor and thromboxane  $A_2$ /prostaglandin endoperoxase receptor antagonist. Prep: E. J. Freyne et al., EP *idem*, US 4963573 (1987, 1990 both to Janssen). **Pharmacology:** B. Heit et al., *Thromb. Haemostas* 69, 1990(3); C. Weber et al., *ibid.* 68, 214 (1992). Clinical peripheral arterial obstructive disease: 1. De Coo et al., *Angiol.* 12, 59 (1993); as adjunct to thrombolysis in myocardial infarction: RAPT Investigators, *Circulation* (1994).

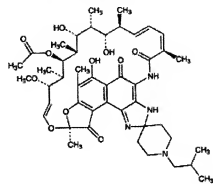


from diisopropyl ether/hexane (2:1), mp 70.3°.

**AP CAT:** Antithrombotic.

**Rifabutin.** [72559-06-9] 1',4'-Didehydro-1-deoxy-2-methyl-5'-[2-methylpropyl]-1-oxorifamycin.  $C_{42}H_{58}N_2O_{10}$ ; mol wt 740.0. C 65.23%, H 7.38%, N 6.61%.  $CH_3(CH_2)_7CH=CH(CH_2)_7COOH$ . Found primarily in oils from the seeds of *Ricinus* spp. *Euphorbiaceae*. Accounts for 100% of the triglyceride fatty acids of castor oil, and up to 80% of the glyceride fatty acids of ergot oil. Bibliography: Ralston, *Fatty Acids* (New York, 1948) p 189. Also found from *Linum mucronatum* (flex). *Linaceae*: Kleiman, *Ann. Lipids* 6, 962 (1971). Structure: Goldsobel, *Ber. 27*, 189 (1894). Mechanism of biosynthesis: Morris, *Biochem. Soc. Res. Commun.* 29, 311 (1967).

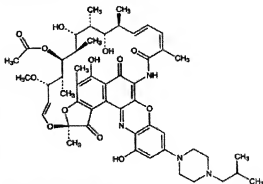
O 20.78%. Semisynthetic derivative of rifamycin S that inhibits nucleic acid synthesis. Prep: L. Marsili et al., DE 2825445 (1979 to Farmitalia); *idem*, US 4219478 (1980 to Archifar Labs). *In vitro* and *in vivo* antibacterial activity: A. Sanfilippo et al., *J. Antibiot.* 33, 1193 (1980); C. Deila Bruns et al., *ibid.* 34, 1502 (1983). Mechanism of action: D. Ungheir et al., *Drugs Exp. Clin. Res.* 10, 681 (1984). Comparative *in vitro* antimycobacterial spectrum: J. M. Dickinson, D. A. Mitchison, *Tubercle* 68, 177 (1987). *In vitro* inhibition of HIV-1 replication: R. Asaad et al., *Antimicrob. Ag. Chemother.* 33, 684 (1988). Clinical pharmacokinetics: M. H. Skinner et al., *ibid.* 33, 1217 (1989). Pharmacology and clinical efficacy in mycobacterial infections: R. J. O'Brien et al., *Rev. Infect. Dis.* 9, 519 (1987).



Violet-red crystalline powder. Highly sol in chloroform, sol in methanol, slightly sol in ethanol, minimally sol in water. uv max (methanol): 493, 315, 274, 238 nm.

**THERAP CAT:** Antibacterial (tuberculostatic).

**8298. Rifalazil.** [129791-92-0] 1',4'-Didehydro-1-deoxy-1,4-dihydro-3'-hydroxy-5'-[4-(2-methylpropyl)-1-piperazinyl]-1-oxorifamycin.  $C_{42}H_{58}N_2O_{10}$ ; mol wt 740.0. C 65.09%, H 7.38%, N 6.61%.  $CH_3(CH_2)_7CH=CH(CH_2)_7COOH$ . Found primarily in oils from the seeds of *Ricinus* spp. *Euphorbiaceae*. Accounts for 100% of the triglyceride fatty acids of castor oil, and up to 80% of the glyceride fatty acids of ergot oil. Bibliography: Ralston, *Fatty Acids* (New York, 1948) p 189. Also found from *Linum mucronatum* (flex). *Linaceae*: Kleiman, *Ann. Lipids* 6, 962 (1971). Structure: Goldsobel, *Ber. 27*, 189 (1894). Mechanism of biosynthesis: Morris, *Biochem. Soc. Res. Commun.* 29, 311 (1967).



Consult the Name Index before using this section.

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## **X. RELATED PROCEEDINGS APPENDIX**

No decisions have been rendered by a court or the Board in any proceeding related to this appeal.

## **XI. TABLE OF AUTHORITIES**

KSR v. Teleflex, 127 S. Ct. 1727 (2007)

In re O'Farrell, 853 F.2d 894, 903 (Fed. Cir. 1988)

In re Kubin, \_\_\_ F.3d \_\_\_, No. 2008-1184, slip op. at 14 (Fed. Cir. Apr. 3, 2009)

Procter and Gamble v. Teva Pharmaceutical, \_\_\_ F.3d \_\_\_, No. 2008-1404, slip op. at 10 (Fed. Cir. May 13, 2009)

In re Kollman, 595 F.2d48, [\*\*20] 56, 201 USPQ 193, 199 (CCPA 1979)

In re Cescon, 474 F.2d 1331, 1334; 177 USPQ 264, 267 (CCPA 1973)

In re Winters, 11 USPQ 2d 1387 (Bd. Pat. App. & Interf., 1989)

### CONCLUSION

In view of the above, Appellants respectfully submit that proper rejections under 35 U.S.C. §§ 102(b) or 103(a) have not been made. Accordingly, reversal of the Final Rejection by the Honorable Board is appropriate and is courteously solicited.

Respectfully submitted,



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